Constitutional Argument and Institutional Structure in the United States

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INTRODUCTION

This book attempts to shed light on the architecture of interpretive reasoning in American constitutional law. Its driving objective is to single out the two main inquiries in the field—*how to interpret the Constitution* and *how to allocate interpretive responsibility and authority*; and to frame them in a way that respects the integrity of each inquiry, while also showing how they are to be assembled in a unified conception of the field. It seeks to explain the fact that institutionalised interpretation, for instance judicial interpretive reasoning in the process of judicial review, involves both institutional considerations about the division of interpretive labour between the political branches and the judiciary, and substantive judgements about the content of the law.

On this analytic basis, it sets forth a normative theory on the structure of constitutional reasoning, by locating the interpretive activity under the fundamental pursuit of political justice and the commitments to constitutional legitimacy and political democracy. It defends the thesis that the latter commitments may not be understood apart from an encompassing account of public reason and political justice: in a just society public reason is the deliberative reason of a political community of free and equal citizens with the power to exercise their equal liberty and to engage in moral reflection about its protective scope. Constitutional reasoning is a special kind of public reasoning, seeking to identify and specify pertinent constitutional norms—especially norms about the very scope of constitutional liberty and equal protection—through dialectic, interpretive reception of the Constitution and of its history of authoritative exposition. The provisional settlement of such interpretive issues is entrusted to a scheme of public institutions, operating as agents of free and equal citizens. Hence, institutions of constitutional implementation, courts in particular, are well advised to interpret their institutional mandate—including the requisite inter-branch synergy and reciprocity—so that they best fulfil this task, and with a view to settle on the more appropriate constitutional determinations, upon reasons that reach citizens as free and equal.

We may set the stage for this analysis by introducing, first, a few famous debates recently conducted before the Supreme Court of the United States; bringing to the fore major controversies between process and substance, history and reason, policy and principle. And we will conclude this book by revisiting judicial doctrine, the multi-faceted scheme of applicable standards of judicial review, with a view to explaining the interplay between substantive and institutional norms and ideas, and to unearthing implicated shortcomings and underlying sensibilities.

I. Supreme Debates

In a historic decision issued on 26 June 2015, the Supreme Court held that States are constitutionally required to license a marriage between two persons of the same sex (*Obergefell v Hodges*).[1] On the majority's broad reading of the constitutional text and history, the fundamental liberties protected by the due process clause 'extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs'. The Court reasoned that the identification and protection of these liberties is an enduring part of the judicial duty to interpret the Constitution. That responsibility requires courts 'to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its due respect'.

Justice Kennedy, writing for the majority, acknowledged that history and tradition guide and discipline this inquiry but are not dispositive, as the generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty 'as we learn its meaning'. The Court then engaged in a constructive reading of its case law on the right to marry and determined that the principles supporting it apply with equal force to same sex couples. It concluded that the traditional limitation of marriage to opposite-sex couples, while having seemed natural and just for generations, is inconsistent with the central meaning of the fundamental right to marry and that such inconsistency 'is now manifest'. The Court engaged in similar analysis under the Fourteenth Amendment's guarantee of equal protection and concluded that denial of same-sex marriage abridges central precepts of equality as well.

The holding was fiercely contested by a minority of four judges. Their dissenting opinions focused on two main themes. On the one hand, liberty interests not enumerated in the Constitution were said to deserve special constitutional protection only so long as they are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'. And proper performance of this task involves the employment 'of neutral principles of constitutional law'. If, on the other hand, the judiciary proceeds on the basis of its own 'understanding of what freedom is and must become', it effectively subordinates 'the *People's* understanding of liberty, at the time of ratification or even today, to the reasoned judgment of a committee of nine unelected lawyers'. 'This practice of constitutional revision by an unelected committee of nine … robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves'.

[1] *Obergefell v Hodges*, 576 US __ (2015).

The minority elaborated on both themes. Justice Scalia scorned the majority for comfortably 'concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003' and all four dissenting justices emphasised that the issue has been at the centre of public debate and political decision making. 'What matters is that the process established by those who created the [civil] society has been honored. … That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves.'

The Chief Justice, concerned about the broader legitimacy of the Court, confirmed that claimants 'make strong arguments rooted in social policy and considerations of fairness'. He even confessed that if he were a legislator, he 'would certainly consider that view as a matter of social policy'. Yet, he emphasised that the judiciary is ill-equipped to impose it upon the political process.

But what makes the claim in controversy a matter of policy? The majority presented it as a matter of high principle, reflecting the foundational commitment of the polity to freedom and equal citizenship. The Chief Justice was well aware that philosophical reflection is pertinent in assessing the merits of the issue. Yet, invoking the specter of the *Lochner* Court (the discredited invocation by the Court a century ago of high principle and common law values to block socioeconomic legislation), the Chief Justice stressed that the Constitution is made for people of fundamentally differing philosophical views. 'Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due on issues of this sort—the democratic process'. As a result, 'whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*'. And the Chief Justice concluded: the 'majority's decision is an act of will, not legal judgment'.

The majority did not let this argument without rebuttal. Acknowledging that democracy is the appropriate process for change, it noted that extensive deliberation has taken place in society and the political process, and emphasised that delay in recognition of a fundamental right, whose validity has become manifest, would let claimants, seeking equal dignity in the eyes of the law, suffer lingering and irreversible pain and humiliation. The moral gravity of the subject matter necessitated judicial settlement.

This case is paradigmatic of some of the most profound debates in constitutional theory. In approaching constitutional text and precedent, how are we to think about the relevance of contestable philosophical issues of political justice and fairness? What is the force of considerations like history and tradition? And,

assuming that constitutional notions like liberty and equal treatment are entrusted to future generations, as they learn their meanings, what is the institutional role of the political and the judicial process in expounding such meaning? Are judges well advised to exercise independent, reasoned judgement, or is the constitutional legitimacy of the result reached simply dependent upon due operation of the political process? And finally, what are the respective roles of policy and principle in constitutional adjudication; how do they help us to distinguish between judicial reasoning proper and acts of will?

The reader should not assume that constitutional adjudication exhibits the Manichean logic implied in the way *Obergefell* framed these profound questions. On the one hand, there are many areas of constitutional law where these supreme debates have played out their contested implications and constitutional doctrine has attained a high degree of settlement; and fields where judicial passivity is treated to be the norm. The main example is the minimal standard of review applicable in socioeconomic legislation. Legislative classifications that do not burden enumerated rights or fundamental liberties, nor implicate suspect groups receive only superficial judicial attention. In an uncontested formulation of the applicable standard of review, socioeconomic legislation 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality' (*Hodel v Indiana*).[2] Absent truly exceptional circumstances, it would cause much surprise were a federal court to invoke an argument of principle, or history, or tradition, or claim the virtues of the judicial process over the federal or state legislatures in this field.

Most importantly, we need to interpolate a third possibility, silenced by the gravity and simplicity of the subject matter in *Obergefell*, and ignored by their absence in *Hodel*. The garden-variety of more refined, theme-specific standards of review, tailoring the structure of constitutional interests to local configurations of policy and principle, of tradition and reason, and the intensity of review to corresponding assessments of institutional competency and legitimacy. Still, in such cases, the issues debated in *Obergefell* stand in the background, by way of purported justification, and often surface back in an endless process of doctrinal specification or revision—gradual or punctuated, contested or consensual.

The recent case law on affirmative action illustrates this third possibility, in all its complexity. In *Fisher v University of Texas at Austin (Fisher I)* (2013),[3] Justice Kennedy, writing for a broad majority of conservative and liberal justices, construed past decisions of the Court for the purpose of articulating the standard controlling race-sensitive university admissions policies. The earlier cases were battlefields of contrasting conceptions of constitutional principle regarding the meaning of racial equality and of different assumptions about the role of the judicial process in their pursuit. The prevailing view was that, while the educational

[2] *Hodel v Indiana*, 452 US 314, 331–32 (1981) (involving heavy requirements imposed upon surface coal mining operations conducted on prime farmland).

[3] *Fisher v University of Texas at Austin,* 570 US __ (2013).

benefits of student body diversity may constitute a compelling state interest, the employment of racial classifications in their pursuit is subject to strict judicial scrutiny. The *Fisher* Court assumed the task of specifying a comprehensive and relatively consensual standard under such precedent.

On the *Fisher* construal of precedent, a university must clearly demonstrate that such policies pursue unquestionably legitimate and substantial interests and that employment of racial classifications is necessary to their accomplishment. In this regard and assuming the educational benefits from student-body diversity to be the stated purpose, a court may give 'some, but not complete' deference to a university's judgement that student-body diversity is essential to its educational mission, provided that diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision. However, once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove, without the benefit of deference, that the means it chose to attain that diversity are narrowly tailored to its goal, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application', and that no workable race-neutral alternatives would produce the educational benefits of diversity.

This complex doctrinal formula reflects a sensibility distinct from the grand narratives of history and reason, democracy and judicial elitism. Analysis is focused on the category of permissible conceptions of diversity and on the proper degree of judicial scrutiny and deference to universities making complex judgements of necessity. The Court was aware of the entanglement of policy and principle and understood that the appropriate synergy between the academic and the judicial process is a delicate issue. On a reasonable reading, the underlying idea was to tie the degree of institutional deference over educational decisions to the task of ensuring fair treatment. Universities have experience and expertise over judgements of educational necessity. Yet, they are also subject to more subtle vices, to imperceptible use of means impermissible, so that judicial attentiveness is crucial—even at the risk of some judicial over-enforcement.

On judicial methodology, the opinion was a fusion of doctrinal reasoning with a strategy to reach compromising common ground on the operation of underlying issues of principle, while postponing contestation to the level of applying the standard on the facts of the case after remand. Justice Ginsburg felt uneasy with both aspects of this methodology and dissented. Three years later, she unreservedly joined the decision of the Court on the merits of the case (*Fisher II*, 2016).[4] The policy in question was held to pass strict scrutiny. Justice Kennedy was satisfied, while conservative justices dissented. 'Something strange has happened since our prior decision in this case', they remarked. And different conceptions of principle, contrasting ideas about the relation between race neutrality and racial equality, resurfaced.

[4] *Fisher v University of Texas at Austin*, 579 US __ (2016).

This book attempts to shed light on the structure of such debates and the ways they affect constitutional doctrine, by proposing a set of more generic ideas about what I perceive to be rather fundamental elements of constitutional reasoning. The following sections present a brief, though dense, summary of the main thesis.

II. The Substantive Structure of Constitutional Interpretation

A. An Aporia

Constitutional theory has identified various modes of argumentation employed in American interpretive practice (so-called arguments from the constitutional text, precedent, structure, history, political morality and public political culture). It has also suggested that these modes do not operate independently and that an interpretive judgement is not supposed to aggregate their individual vectors.[5] In *Obergefell*, for instance, we wouldn't sensibly ask how well each outcome would fare along the dimension of history and the dimension of reason and then aggregate respective rankings. Practitioners may also appreciate that they shall tailor the way they treat each factor to the reasons for paying attention to them. Still, they lack, I fear, a satisfactory account of the way history, tradition or independent reason matter and make sense together, as elements of an overall interpretive argument.

In my opinion, this defect is explicable in the light of uncertainty about the character of legal interpretation and its location in the realm of practical reasoning. And this uncertainty can be attributed to the difficulties of delineating the appropriate relation between the commitment to constitutional authority, on the one hand, and the pursuit of political justice, on the other. Without some sense of how constitutional legitimacy relates to justice and how history matters in this relation, we lack critical intellectual resources for approaching a matter as thorny as the one raised in *Obergefell*, when local traditions appear recalcitrant to the intuitive demands of justice or, even worse, when many of us are tempted to understand the claims of litigants as generic claims of policy rather than as claims of constitutional justice.

Part One of this work addresses this underlying source of confusion by attempting to locate constitutional interpretation within the wider chart of practical reasoning and by defending a normative thesis about the governing ideas. In carrying out this project, I focus on the fact that constitutional interpretation is a species of

[5] See Richard Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1987) 100 *Harv L Rev* 1189 and Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford, Oxford University Press, 1982) and *Constitutional Interpretation* (Oxford, Basil Blackwell, 1991) 28–30.

practical reasoning, that is to say, reasoning about how to conduct ourselves and arrange public institutions. As a kind of practical reasoning, it is shaped by a pertinent stock of values, concerns and commitments. Humans try to understand and explain the practical reasons they have over a specified domain against the backdrop of concerns and commitments about what is worth respecting and achieving. Accordingly, it is of paramount importance that we identify the pertinent stock of concerns and commitments that frame constitutional interpretation as a kind of human practical reasoning. An explanation of this normative framework would then highlight the general normative structure that is needed so that constitutional interpretation may serve its appropriate role.

B. Summary of the Argument

Constitutional law addresses fundamental issues about the exercise of public power. Practical reasoning about how public power is to be exercised is subject to *public reason* and is ideally performed in the light of attractive conceptions of political justice.

However, constitutional interpretation does not aim at explaining public reason *per se*. Its subject matter is constitutional *law*—the law's take on some fundamentals of public reason. In this sense, constitutional interpretation is a special kind of practical reasoning: it is reasoning about the content of an *institutional normative system*. An institutional normative system is not necessarily a valid system of norms. Yet, in reasoning about its content, we believe or *assume* so. We assume the authority of constitutional law (that is to say, we assume that under public reason the exercise of public power is subject to existing constitutional law) and we try to explain the practical reasons that constitutional law (supposedly) gives its subjects.

The process of explaining these reasons is underdetermined by text, precedent and understandings prevalent in constitutional practice. In fact, constitutional interpretation is a constructive enterprise of practical deliberation through which reflective practical reason constructs accounts of the normative reach and import we acknowledge to constitutional practice. This conception of the character of constitutional interpretation is a function of the reflective and critical ways in which argumentative constitutional practices receive and interact with the constitutional text and the history of its authoritative exposition.

Given the constructive nature of constitutional interpretation, we proceed to explain the normative principles to govern interpretive construction. The driving idea is that, in interpreting the Constitution, we are supposed to respond to the reasons for upholding constitutional legitimacy under public reason and political justice. The general aim is to construct *morally sound* accounts of the Constitution, along with surrounding practice of authoritative constitutional exposition, so that public power would be exercised in *better compliance* with *public reason* and *political justice*. This aim is understood against the placement of constitutional legitimacy under political justice. A morally sound account is supposed to

redeem the commitment that, given the institutional world inherited, by following the normative import of the Constitution, public power would be exercised in better compliance with political justice.

Under this general aim, I emphasise two complementary features of interpretive reasoning: the employment of practice-dependent considerations serving the rationale for endorsing the authoritative status of constitutional text and precedent even if they lack ideal content, and sensitivity to the very justice of constitutional content. And I argue that, in determining the contours and proper adjustment of these elements, and in specifying the rules and principles that constitutional law provides us with, we engage in delicate exercises of moral reasoning under conditions of political legitimacy. Thus, the debate over the role of history and tradition in arguments of principle, as in *Obergefell*, is ultimately a question about the reasons for upholding the scheme of constitutional law under political justice, and about their implications for the ways we receive and interact with text and past practice.

III. The Institutional Architecture of Constitutional Interpretation

A. An Aporia

A second, particularly troubling source of confusion and contestation affecting constitutional practice, judicial review in particular, relates to the employment of institutional constraints in judicial reasoning. Is a court's assessment of a fundamental liberty affected by the settlement reached or not reached in the political process? Is a court's determination about the necessity of affirmative action measures affected by the university's reasoned judgement in the affirmative? Although questions of this sort are prevalent in adjudication, the pertinent issues are often mishandled or misunderstood. There are, most importantly, two recurrent, contradictory, and equally misguided dispositions: to treat issues of *institutional structure* as self-justified, and to collapse them to issues of *interpretive substance*.

For instance, it is common to assume that the judge is supposed to adjudicate on independent interpretation of applicable law, as 'it is emphatically the province and duty of the judicial department to say what the law is'.[6] At the same time, conceding that the judiciary lacks the legitimacy to review certain assessments of fact or value, these very same judges may ironically conclude that these considerations do not pertain to legal reasoning. Failing to distinguish between the necessity to rest their judgment on an interpretation of the law and the supposed necessity to rest it on their independently constructed interpretation of the law, judges often

[6] *Marbury v Madison*, 5 US 137, 177 (1803).

adopt an account of legal reasoning that is little more to a context specific account of judicial reasoning. And failing to distinguish between *judicial reasoning* and *legal reasoning*, they often drop their convictions of constitutional value and adopt new ones to operate smoothly under a fully independent standard of review. This leads to a distorted picture of the substantive interpretive question and of normative constitutional theory itself.

Thus, failure to distinguish between a substantive norm of 'reasonableness' and a standard of review calling for 'proof of clear unreasonableness' gives the impression that constitutional law is silent over ordinary socioeconomic legislation. And this culture has repercussions throughout constitutional law. It provides an excuse, for instance, to the conservative minority in *Obergefell* for disclaiming the constitutional nature of the pertinent questions of substance (treating them as issues of social policy) and for avoiding direct confrontation with the constitutional deliberations of the political process under a proper standard of review. And it silences the claim of the liberal minority in many affirmative action cases that there is a legitimate, inclusionary constitutional vision of equal protection, emerging in the political process; and that the limitations of the judicial role in its primary enforcement do not deprive it of its constitutional status. Judicial cognizance, on the other hand, that there exists constitutional space beyond judicial doctrine would set the stage for a constructive debate about institutional structure; about the proper synergy between the political and the judicial branches in constitutional implementation; and about the critical hedge of the judicial process in safeguarding certain commitments of principle.

Even when we recognise the distinctive role of institutional constraints, we are often tempted to assume that they involve trade-offs with considerations of substance; that judges somehow have to balance constitutional rightness with separation-of-powers principles. In this assumption, we fail to see that institutional considerations do not operate on the same level with substantive ones. Institutional considerations are of a *higher-order*: they are supposed to *structure* the role of substantive interpretive judgements of different bodies in institutionalised reasoning—rather than to rival them.

A sense of rivalry between structure and substance supports a culture of infidelity to structure, experienced in opportunistic treatment of standards of review. Trade-offs imply loss to rightness. In agony to avoid such loss, we are tempted to assess the applicable standard of review on the sole basis of the preferred outcome on the merits. Thus, we criticise a decision for not showing adequate deference to judgements of Congress that appear persuasive; inclined, next time, to argue for safeguarding the integrity of judicial review against alarming legislative pronouncements. This in turn reinforces an equally problematic response: treating standards of review as self-justified—even if they fail miserably to produce appropriate resolutions.

Resolving the above puzzles requires that we locate judicial reasoning within the wider chart of constitutional reasoning; and, in this course, that we rationalise the institutional dimension of judicial reasoning. This is the task of Part Two.

B. Summary of the Argument

The institutional nature of law and the constructive nature of constitutional interpretation establish the distinctive character of the following normative inquiry: how is the task of constitutional construction to be assigned to the various institutions charged with applying constitutional law? This question is analytically distinct from the debate regarding the substantive structure of constitutional reasoning. Hence, there is an analytic distinction between institutional structure and interpretive substance and, from the point of view of the reviewing court, a corresponding distinction between judicial reasoning (as structured by the resolution to the institutional question) and the wider realm of constitutional reasoning.

With regard to judicial review, the institutional question is salient in debates about the intensity of review, including the degree of deference to the political branches and to the administration. This issue, I argue, is best understood as involving the institutional scheme structuring the substantive judgements of various institutions for the purpose of resolving the pertinent dispute. Indeed, in making public policy, at least in ideal cases, the political branches often give content to ideas of liberty and equal protection. They do so both when they further the underlying causes and when they limit. And even though they do not often articulate their constitutional premises, they make, or at least proceed upon value judgements of constitutional significance. Intensity of review, properly understood, relates to the institutional structuring of these judgements and of requisite judgements of the reviewing court in forming the applicable constitutional determination.

To understand the nature and normative justification of institutional norms of this sort, we employ the perspective of the reviewing court and examine the normative commitments and pursuits framing judicial reasoning: the fundamental commitment that public power be exercised on the basis of public reason and political justice, and the commitment to the public and joint nature of authoritative interpretive construction.

Proper recognition of features like the existence of reasonable pluralism over constitutional interpretation and the role of public institutions as the collective arms of the political community ground the institutional dimension of judicial reasoning. They show that, under public reason and political justice, the judge may have most reason to exercise judicial review on the basis of an institutional scheme that may diverge from a fully independent standard of review. Such a scheme takes the form of institutional norms of a higher order with regard to the substantive judgements at issue. These norms *structure substantive judgements of different bodies* in the process of settling on the applicable interpretation of the law. This sets the stage for exposing the category mistake made by those who argue for trade-offs between substance and institutional structure.

At the same time, the pursuit of political justice frames the deliberation involved in determining which institutional scheme is preferable: ideally, the one ensuring

better compliance with public reason and political justice. Institutional allocation may be the product of chance, luck, power or deliberate design. Yet, the reviewing court has reason to craft and apply those institutional norms that promote better compliance with political justice. I argue that in the paradigmatic case this implies the pursuit of *appropriate interpretations of the law,* of best serving the fundamental desiderata of constitutional interpretation under public reason and political justice.[7] I also discuss the relevance of systemic considerations, including the constitutional integrity of the political and the judicial processes, under the very same overarching pursuit, as well as the implications of uncertainty for outcome-oriented institutional choice.

An important lesson of this justificatory account is that, while institutional norms exhibit a certain kind of priority with regard to the substantive arguments on the interpretive issue at hand, the justification of institutional norms presupposes some conception about the general aims of constitutional interpretation. In this sense, structure depends upon substance. After I discuss the conceptual difficulties involved in this insight, I briefly examine the two main tensions that pertain to the design and interpretation of institutional norms: the tension between functional specialisation and institutional checks (chapter eight) and the tension between the commitment to political equality and to other aspects of political justice (chapters nine and ten).

On the latter issue, I advance the idea that, in deliberating about the more appropriate institutional process, we appeal to reasons that reflect the bonds of reciprocity among co-equal and free members of a political community with diverging views about political justice. This commitment underlies the requirement that the appropriate structure shall, among other things, respect the fundamental interest of each citizen to participate in public life and through the exercise of deliberative responsibility affect the formation of public policy and, secondly, treat each citizen as having the capacity for a sense of justice that is worthy of equal respect. At the same time, it also demands that we understand these ideas as elements of a broader principle mandating that government recognises and secures to each citizen a scheme of equal liberty, where the political and the non-political dimension are mutually adjusted.

On this frame, I discuss how the pursuit of democratic responsiveness affects the appropriate standard of review. And I argue that the appropriate process shall be well-suited to engage in a dialogue with the citizenry, a dialogue that is open and conducted on reasons that in good faith reach all citizens as free and equal. Thus, the cornerstone of the debate in *Obergefell*, to take a characteristic example, was precisely about the proper role of the Court in engaging with a political community of free and equal citizens on the implications deriving from this very fundamental commitment to equal citizenship.

[7] This was the main argument advanced in my doctoral dissertation, *Institutions of Justice: The Institutional Assignment of Interpretive Labor in Public Law Litigation*, SJD thesis, Harvard University (2000).

IV. A Topography of Judicial Doctrine

Institutional norms are often operationalised in the form of judicial doctrine, imposing self-discipline in the institutional reasoning of courts, while also setting in motion path dependent processes of institutional elaboration and contestation. Having reviewed basic analytic features, benefits and weaknesses of such processes in Part Two (chapter seven), I attempt in Part Three a survey of the practised field, aiming to highlight the interplay of institutional and substantive ideas.

My main argument is that much of American constitutional doctrine has a dual character, involving both an institutional and a substantive function. First, it has a substantive dimension; it provides an interpretation *of the normative content of substantive constitutional law*. That interpretation sometimes covers only part of applicable law, capturing only violations of a certain kind or magnitude. In this sense, constitutional doctrine may diverge from exhaustive formulations of applicable constitutional law, covering only judicially enforced law. Secondly, *it regulates the applicable scope and intensity of review, organizing the pertinent judicial assignment*. That institutional norm specifies the substantive constitutional judgements that courts are directed to make themselves and the way they are structured with relevant judgements of the reviewed body, in the process of forming an overall constitutional determination and resolving the dispute at hand.

An important objective of this work is to explain the operation of these features, while accommodating the rhetoric about judicial sovereignty over the law. At the same time, it aims to explain the contestation experienced in the field over the institutional dimension of constitutional doctrine. Such contestation may relate to the capacities and performance of judicial and political institutions. But quite often it is due to competing conceptions of political justice as the design and interpretation of an institutional scheme is mainly assessed on the appropriateness of the outcomes it is expected to produce.

Understanding the relation between the institutional and the substantive function of constitutional doctrine also enables us to detect noteworthy inconsistencies of approach. The theory of judicial under-enforcement, for instance, illuminates that there may be more to constitutional law than limited judicial competence and legitimacy perceives. And institutional considerations calling for searching review are often confused with overreaching substantive constraints, a point calling for re-examination of the substantive parameters of over-protection. Finally, appreciation of the institutional nature of constitutional doctrine provides us with a much better perspective in dealing with thorny issues of judicial *supremacy*: the asserted authority of judicial doctrine over future governmental conduct, and over complementary mechanisms of constitutional enforcement, like the mandate of Congress to enforce the reconstruction amendments. And, given the availability of such mechanisms, it brings to the surface the tension between absolutist claims

to judicial supremacy and the proper synergy among the branches of the federal government in the joint project of constitutional construction.

Institutional considerations are not supposed to compete with substance, but to serve it. Recognition of their proper space is crucial for avoiding loss in constitutional vision. And it forces us to be critical over their proper content. Reasons for deference or for independent review are not self-justifying, as public institutions do not exercise privileges; they serve public functions, subject to public reason and political justice. The institutional scheme established by doctrine is to be assessed on the ways it organises a functional process: the process of engagement with interpretive pluralism with a view to settlement on appropriate constitutional constructions under public reason and political justice.

In the final chapter of this book, I engage in the task of unearthing sensibilities lying beneath the broader doctrinal frame and its institutional underpinnings. The starting point is the appearance of a puzzling *discontinuity* with regard to the intensity of review over issues of law between constitutional and agency-administered statutory law, as agencies are empowered with conditional interpretive authority over ambiguous statutory schemes they administer. This contrast enables us to single out two important features of constitutional doctrine, inviting us in turn to explore explanatory conjectures. In constitutional law the determination of the applicable standard of review is theme-specific as the standard is built into the doctrinal explication of the law, whereas in administrative law a uniform frame applies across the board and has an explicitly institutional nature. Moreover, in constitutional law, doctrine often reflects (in its content) or prescribes (in its operation) a high level of judicial scrutiny over issues of constitutional principle, whereas agencies are entrusted with broad interpretive responsibility over issues of statutory policy within their generic mandate.

I conclude offering a tentative argument about the salient sensibilities behind this frame. I discuss, in a genealogical fashion, dominant perceptions of institutional competency and institutional mistrust and I highlight the development of *a penetrating sense of moral significance* in much of constitutional law, along with the perception that principled and judicially articulated schemes are available for appropriate judicial engagement. In this context, I explore the idea that the domain of constitutional rights constitutes a domain of *principle*, structuring the realm of permissible public policy—as the violation of such rights inflicts upon right-holders a *wrong* that is crucially different from the kind of *loss* incurred in unwise or unbalanced combinations of substitutable components of public policy.

My argument does not imply that the scope and implications of this sensibility are anyhow settled in constitutional practice; on the contrary, they are the subject-matter of critical debate and contestation. And, as our reflections on the constructive nature of constitutional interpretation (chapter four) and on the substantive commitments of institutional reasoning (chapter six) would bring us to expect, that debate is ultimately accountable to competing visions of political justice, and to the operation of contrasting conceptions of constitutional legitimacy and democracy thereunder.

V. Methodological Prolegomena

Having established a normative conception about the character, the substantive, and the institutional structure of constitutional interpretation, we may claim that we have framed a general normative account of the field; and, hopefully, that we have explained how the pursuit of political justice and the commitments to constitutional legitimacy and political democracy are assembled in this domain under public reason, rather than left around, as independent variables pulling apart interpretive principles and straining the pursuit of integrity in constitutional practice. But before we embark upon this task, it is helpful to clarify certain methodological presuppositions.

The account proposed here is primarily an endeavour in critical self-understanding. We adopt the internal perspective, the perspective of raising arguments about the content of the law within the practice. We understand them as arguments of practical reason. And we abstract from specific disputations, aiming to make best sense of constitutional reasoning in its generality, given fundamental features and commitments of the practice and their placement under practical reason. But we cannot even begin to sketch such an account without engaging with ideas about practical reason and about how constitutional law may be considered authoritative thereunder. And we cannot frame normative ideas guiding constitutional reasoning without giving further content to constitutional legitimacy, political democracy and public reason.

Accordingly, the analysis to follow does not aspire to value neutrality. But it would be quite misleading to assume that all the normative arguments I employ are of the same category. Everything depends on what is claimed at each stage in the exposition. Sometimes, the argument seeks coherence in light of relatively formal features of legal practice and practical reason. The more formal the analysis becomes, the more I aspire to what is often called analytical jurisprudence. But even an analysis of formal features of practical reason is not value neutral. Elsewhere, the argument engages into substantive argument about principles underlying the law and discusses the content that institutional structures need to have to serve them. In doing so, I make an effort to proceed on a high level of generality. In this sense, the argument retains critical force, while allowing for its endorsement by readers who hold a reasonable variety of substantive ideas. Yet, there are also places where I specify a bit more the operative concepts (ie, by thickening the account of political equality in chapter nine) or the appropriate content of institutional norms (ie, by clarifying and criticising prevailing assumptions concerning the appropriate standard of review). Along this spectrum, there is a continuum of analysis—as we move from a formal explanation of fundamental features of a practice to an account of the justification of particular institutional and substantive arguments within the practice.

In the wider framework of legal ideas, this work attempts to assemble, refine and structure ideas developed by three distinct schools of thought: the legal process

school that reigned in the American legal academia in the 1950s, the long tradition of reasoned, principle-seeking interpretation, and the contractualist school of normative political theory. Ever since the 1960s, the two main strands of the legal process school—emphasis on process and purposive interpretation—have been thought to be in sharp tension. In the 1960s and 1970s process-based ideas were withering away and an account of legal interpretation that emphasises the service to the justification of the interpreted norm was gaining ascent. In the more recent misty times, process-based ideas have resurfaced, in a misleading blending with purpose-agnostic institutional analysis. Against that background, this exposition may be understood as an endeavour in reconciliation—guided and tested against the commitment to political justice.

The reader should be aware though that adoption of this perspective comes at a price. As this book engages in critical synthesis of ideas implicit in these three discourses, it detaches itself, in import if not in intent, from alternative currents of thought. For instance, our approach may not appear congenial to students of constitutional practice who show deep scepticism about public rationality, doubt the attractiveness of political justice as a structuring value or approach the law in fundamentally voluntaristic terms. It is not my purpose here to show that such competing schemes of thought are deficient—other than perhaps by structuring in an attractive and balanced scheme what we take to be fundamental normative commitments of American constitutional practice.

Finally, as I read the pages that follow, I acknowledge the influence of philosophical pragmatism. In an important sense, practice is primary in philosophy. We cannot exercise philosophy from Sirius, aiming to discover what facts and values there are. We start from the fact that we participate in multiple practices and that we care about our fundamental interests: the interest in living in a just political community and the interest in leading lives we deem to be worthwhile. Human knowledge is the product of this interaction. Faced with a social world we do not fully grasp, we construct explanatory accounts of our practices and form principles of justice to guide our social and political conduct in furtherance of our fundamental interests.[8]

[8] The constructivist character of human knowledge and the role of values in the process of construction do not imply the lack of objectivity of the knowledge produced. See Hilary Putnam, 'Pragmatism and Moral Objectivity' in his *Words and Life* (Cambridge, Harvard University Press, 1994) 151–81, and 'Objectivity and the Science/Ethics Distinction' in his *Realism with a Human Face* (Cambridge, Harvard University Press, 1990) 163–78.